Supreme Court, U.S.
FILED

04 237 AUG 16 2004

OFFICE OF THE CLERK

In the Supreme Court of the United States

JIMMY IRVIN, Individually and on Behalf of His Minor Child, Adam Irvin; MELBA IRVIN, Individually and on Behalf of Her Minor Child, Adam Irvin,

Petitioners,

v.

HYDROCHEM INC.; HYDROCHEM INDUSTRIAL SERVICES, INC.; GEORGIA GULF CORPORATION; MASTER MAINTENANCE CORPORATION; MASTER MANAGEMENT CORPORATION; PAYNE & KELLER COMPANY, INC.; LOUISIANA INTRASTATE GAS CO., L.L.C.; L.I.G, LIQUIDS CO., L.L.C.; AMOCO PIPELINE CO.; AMOCO ENERGY TRADING CORPORATION; XL INSURANCE CO.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT S. ABDALIAN
Counsel of Record
ROBERT S. ABDALIAN, LLC
1050 S. Jefferson Davis
New Orleans, LA 70125
(504) 304-2308

QUESTIONS PRESENTED

1. Whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. 201-08 (2002), confers federal removal jurisdiction in the following familiar circumstances:

- Plaintiffs, non-signatories to an arbitration agreement, bring a personal injury action against multiple tortfeasors in state court;
- Plaintiffs include in their lawsuit direct action claims against a tortfeasor's foreign insurers;
- The tortfeasor has a written agreement with its insurers to submit disputes to arbitration;
- The tortfeasor and its insurers' arbitration agreements are subject to the Convention;
- The direct action defendant's insurers seek federal removal on the strength of the Convention;
- Plaintiffs do not consent or otherwise acquiesce to arbitration; and
- All defendants do not consent to removal from state court to federal court.

2. Whether a trial court can ignore evidence attached to a Fed. R. Civ. P. 59(e) motion to reconsider a judgment where the evidence would arguably defeat summary judgment dismissal and the failure to produce such evidence cannot be fairly attributed to the litigants?

Rule 29.6 Statement

Pursuant to Supreme Court Rule 29.6, petitioners state that they are individuals whose names fully appear in the caption.

Abbreviations

Pet. App.
Appendix to the Petition for Writ of Certiorari

R.
Record on Appeal.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
RULE 29.6 STATEMENT ii
ABBREVIATIONS ii
TABLE OF AUTHORITIES .....
OPINIONS BELOW 1
JURISDICTION 1
STATUTORY PROVISIONS 2
STATEMENT 4

A. Facts Giving Rise to the Petitioners' Mustard Gas Tort Claims 4

B. The case is removed to federal court. 5

C. Proceedings in federal district court. 6

D. The Court of Appeals' Decision 9

1. The Rule 59(e) motion 9

2. The jurisdictional issue: Is there federal jurisdiction? 11

REASONS FOR GRANTING THE PETITION

I. THE CONDITIONS PRECEDENT FOR ARBITRATION ARE NOT PRESENT. 14

A. The Conditions Precedent for Arbitration: a Mutual Agreement to Arbitrate 14

B. The Convention Requires Mutuality of Contract. 16

C. Exceptions to the Agreement in Writing Requirement 16

1. Incorporation by reference; 17

2. Assumption 17

3. Agency 18

4. Veil-Piercing/Alter Ego 18

5. Estoppel 18

6. Third-Party Beneficiary 19

D. Removal requires consent of all defendants. 19

II. Manifest Injustice. 21

A. The customary rule that one who voluntarily chooses his attorney cannot avoid the consequences of the acts or omissions of his freely selected agent should not apply where there are large gaps where the litigant during critical times in the litigation was without counsel—"a situation permitted by the district court—during the period of time that assistance of counsel was most crucial"—and counsel was allowed to withdraw during this critical time without

any procedural safeguards and without inquiring of an unrepresented litigant if it was his desire to proceed at any time without representation. 22

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Acosta v. Master Maintenance & Constr., Inc., 52 F.Supp.2d. 699 (M.D. La. 1999) 1, 6, 20, 21

EEOC v. Waffle House, Inc., 534 U.S. 279, 293-94, 151 L. Ed. 2d 755, 122 S. Ct. 754 (2002) 15, 17

First Options v. Kaplan, 514 U.S. 938, 944, 115 S. Ct. 1920, 1244, 131 L. Ed. 2d 985 (1995) 15

Javitch v. First Union Securities, Inc., 315 F.3d 619, 629 (6th Cir. 2003) 17

Link v. Wabash R.R, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962) 14, 23

Matter of Amoco Petroleum Additives Co., 964 F.2d 706 (7th Cir. 1992) 20

Sapic v. Gov't of Turkm., 345 F.3d 347, 353 (5th Cir. 2003), *reh'g denied, reh'g, en banc, denied*, (5th Cir.2003) 15, 17

Sedco, Inc. v. Petroleos Mexicanos Mexican Na"l Oil Co., 767 F.2d 1140, 1144-45 (5th Cir. 1985) 16

Smith v. Ayer, 101 U.S. 320, 326, 25 L.Ed. 955 (1879) 23

Thomson-C.S.F., S.A. v. American Arbitration Ass'n, 64 F.3d 773, 777 (2d Cir. 1995) 17

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960). 14, 15

Westmoreland v. Sadoux, 299 F.3d 462, 465 (5th Cir. 2002) 15

Zimmerman v. Int'l Cos. & Consulting, Inc., 107 F.3d. 344 (5th Cir. 1997) 19

Statutes and Treaties

21 U.S.T. 2517 2

9 U.S.C. § 201 *et seq.* .....*passim*

9 U.S.C. 201-08 (2002) 2

28 U.S.C. § 1254(1) 1

La. Rev. Stat. § 22:655 5

Other Authorities

Annot., *Enforcement of Arbitration Agreement Contained in Construction Contract by or Against Nonsignatory*, 100 ALR5th 481 (2002) 17

Ballentine's Law Dictionary, 3rd Edition (1969) 19

Comment, Arbitration, Consent and Contractual Theory: The Implications of EEOC v. Waffle House, 8 Harv. Negot. L. Rev. 289 (2003) 18

Holstein-Childress, *The Enforceability of Arbitral Clauses Contained in Marine Insurance Contracts Against Nonsignatory Direct Action Claimants*, 27 MAR. LAW. 205 (2002) 17

Grundmeyer, *Fifth Circuit Symposium 2000: Insurance*, 46 Loy. L. Rev. 31, 36 n.34 (2000) 21

Lamm & Aqua, *Defining the Party—Who is a Proper Party in an International Arbitration Before the American Arbitration Association and Other International Institutions*, 34 Geo. Wash. Int'l L. Rev. 711, 720 (2003)....16, 17, 18

Rules

F.R.Civ.P. 59(e) 24

Fed. R. Civ. P. 59(e) 9

Treatises

Farnsworth Contracts Sec. 4.26, n.19 (2001)... 19

Moore's Federal Practice (2004) 20

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Jimmy Irvin, *et al.*, (the "Irvins"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a–27a) is reported at 367 F.3d 473. The opinions of the District Court for the Middle District of Louisiana (John V. Parker, J.) denying petitioners' motion to alter, amend, and reconsider judgment is set forth in Pet. App. 27a–30a; granting summary judgment is set forth at Pet. App. 32a–38a; and denying the motion to remand to state court is set forth in Pet. App. 38a–48a. The opinion of the district court in the related case of *Acosta v. Master Maintenance & Constr., Inc.*, is reported at 52 F. Supp. 2d 699 (M.D. La. 1999). Pet. App. 49a.

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit was entered on April 20, 2004. Pet. App. 2a. A timely petition for rehearing was denied on May 17, 2004. Pet. App. 1a. This petition for writ of *certiorari* is filed within 90 days of the date on which the appellate court denied rehearing. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201-08 (2002),[1] [hereinafter the **Convention Act**] provides at 9 U.S.C. § 201–05:

> **Sec. 201**. Enforcement of Convention
>
> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.
>
> **Sec. 202**. Agreement or award falling under the Convention
>
> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United

---

[1] 9 U.S.C. 201-08 (2002) implements the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention Act), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, reprinted in 9 U.S.C. § 201 note (2002).

States if it is incorporated or has its principal place of business in the United States.

Sec. 203. Jurisdiction; amount in controversy

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

Sec. 204. Venue

An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

Sec. 205. Removal of cases from State courts

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not ap-

pear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter I of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

STATEMENT OF THE CASE

A. Facts Giving Rise to the Petitioners' Mustard Gas Tort Claims

Petitioners Jimmy Irvin, a worker, Melba Irvin, his spouse, and Adam, their minor son, along with a multitude of others, sued respondents, Georgia Gulf, *et al.*, ("Georgia Gulf Defendants") in state court. The Irvins alleged state tort law claims for negligence, gross negligence, and later amended their complaint to include an intentional tort arising from injuries "relating to the release of a mustard gas agent at the Georgia Gulf Corporation facility in Plaquemine, Louisiana, that occurred on or about September 25, 1996."[2] Suit was commenced in late 1996 and the Irvins became parties in 1997.[3] Well over 100 plaintiffs brought suit related to this mustard gas release.

In August 1997, Georgia Gulf's insurers, X.L. Insurance Company ("X.L.") and Primex, Ltd. ("Primex"), a Barbados corporation and a Bermuda corporation, "were named as defendants in this

---

2 Court of appeals decision at Pet. App. 3a.

3 Pet. App. 3a–4a.

action pursuant to the Louisiana Direct Action Statute, La. Rev. Stat. § 22:655."[4]

B. The case is removed to federal court.

In March 1999, over two years after the case was commenced, X.L. and Primex moved to remove the case from state court to federal court, pursuant to the Convention Act, 9 U.S.C. § 201 *et seq.* X.L.'s and Primex's "notice of removal allege that the grounds for removal is a dispute over coverage between the foreign insurers and Georgia Gulf."[5] X.L. and Primex asserted "that their insurance policies require that all coverage issues between Georgia Gulf and themselves be resolved through arbitration outside the United States." *Id.*

X.L. and Primex further asserted they have a right to remove the entire case from state court and not just the insurance dispute issue, "because the arbitration clauses contained in their respective policies are subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards," and since the Irvins' "state court action is 'related to' this agreement [*i.e.* the insurance policies] [the state court action] is subject to removal" to federal court at any time before the trial.[6]

"The Irvins filed a motion to remand on April 5, 1999," on the basis that defendants waived re-

---

4 *Id.*

5 Pet. App. 50a.

6 Pet. App. 51a.

moval, removal was not timely, removal was not made with the consent of all defendants, there was no arbitral issue between plaintiffs and defendants, and state court issues should have been severed and remanded. The district court in its ruling denying the motion to remand explicitly adopted its ruling and findings in the related *Acosta* case.[7]

The district court then found it had original jurisdiction over the entirety of any action falling under the Convention Act, that defendants did not expressly waive removal, that removal of the action from state court was timely, that there was an arbitral issue, and that removal was not contingent on consent of all defendants.[8]

C. Proceedings in federal district court.

The Irvins had no fewer than four separate sets of attorneys that represented them in federal district court before the district court entered summary judgment against them. The record is unclear as to why the Irvins' attorneys withdrew. The record does show that when the district court permitted the Irvins' third set of attorneys to withdraw on March 14, 2002, the Irvins were without legal representation for five months during a critical period in this litigation.

---

7 Pet. App. 40a referring to *Acosta v. Master Maintenance & Constr., Inc.*, 52 F. Supp. 2d 699 (M.D. La. 1999) set forth at Pet. App. 49a.

8 Pet. App. 38a-48a.

On March 1, 2002, a pretrial Order was entered setting forth pretrial deadlines. This Order was entered at the request of the Irvins' attorneys, Bensabat and Edwards. The March 1, 2002, Order directed the Irvins to: 1) produce all medical reports by March 15, 2002—**one day** before the third set of attorneys were permitted to decamp; 2) list all treating physicians and identify all experts by July 1, 2002; and 3) submit all expert reports by August 1, 2002. Remarkably, Bensabat and Edwards were permitted to withdraw without the court making certain, let alone inquiring, whether the Irwins engaged new counsel or whether they desired to proceed *pro se*.

"In short, the Irvins were completely without counsel—a situation permitted by the district court—during the period of time that assistance of counsel was most crucial to the Irvins' case."[9] It was during this five month legal representation gap that each of the cutoffs and deadlines contained in the March 1, 2002, Order fell.

The Irvins were unaware of the deadlines; they did not have knowledge of Georgia Gulf's motion seeking summary dismissal of their case and they were clueless that their case could be dismissed.[10] In these circumstances, it is unremarkable that the "Irvins failed to meet each of these court-imposed deadlines."[11]

---

9 Pet. App. 23a.

10 R. 615.

11 Pet. App. 28a.

On August 22, 2002, attorney George Tucker enrolled as counsel for the Irvins.[12] The trial judge held a status conference on August 27, 2002, which Tucker attended.[13]

On August 30, 2002, the Georgia Gulf Defendants filed a motion for summary judgment and/or dismissal, asserting that the Irvins had failed to satisfy the elements of their claim. The Irvins filed no opposition to the Defendants' motion for summary judgment.

On October 30, 2002, the district court issued its ruling granting the Defendants' motion for summary judgment. The district court stated:[14]

> In this case, plaintiffs have alleged that they suffered harm by exposure to the mustard gas release but have failed to produce any evidence whatsoever of such injury. In a toxic tort case such as this . . . medical evidence is essential to establish harm to plaintiffs. Without having produced any medical evidence, plaintiffs cannot establish that they suffered damages, an essential element of their case.

Subsequently, on November 5, 2002, George Tucker, the Irvins' counsel, filed a motion to withdraw from the case. The district court granted the withdrawal on November 20, 2002, and entered

---

[12] R. 510.

[13] R. 516.

[14] Pet. App. 6a; 37a.

judgment dismissing the Irvins' case the following day.

On December 6, 2002, the Irvins obtained new counsel, who immediately filed a Fed. R. Civ. P. 59(e) motion to alter, amend, and reconsider the judgment. Specifically, the Irvins requested that the district court reconsider and vacate the November 21, 2002, judgment to prevent manifest injustice.

Plaintiffs' Rule 59 motion contended that ample evidence exists showing that Mr. Irvin's exposure to mustard gas at the Georgia Gulf facility caused him to suffer serious diagnosed and documented physical, mental, and emotional damages. Plaintiffs attached to their motion treating physician reports which were produced during discovery, as well as an affidavit from Mr. Irvin.[15] Plaintiffs' motion contended that this evidence linked Mr. Irvin's exposure to his physical and psychological problems. The district court did not consider this evidence and denied the motion.

D. The Court of Appeals' Decision

1. The Rule 59(e) motion.

A divided panel of the court of appeals affirmed finding "that the facts in this case do not warrant the extraordinary relief associated with the granting of a motion for reconsideration. Therefore, the district court did not abuse its discretion in deny-

---

[15] Pet. App. 19a.

ing the Irvins' Rule 59(e) motion."[16] Simply put, the failure of the Irvins to respond to defendants' summary judgment papers was fatal.

Judge Dennis in his dissent found that "the district court has presided over many other cases involving this same chemical spill. In exercising its discretion ... the district court should have also considered the likelihood, based on its experience in these other cases, that plaintiff's additional evidence was relevant to the merits of the summary judgment motion."[17] Judge Dennis believed it "was a misuse of judicial discretion" not to consider the medical and causation evidence submitted with the Irvins' Rule 59(e) motion,[18] since

> First the plaintiffs did not present the evidence to the district court initially, through no fault of their own, but because they were subjected to attorney conduct and inaction so egregious that it "amounted to nothing short of leaving [them] unrepresented." While it is true that a district court has the discretion to refuse to use Rule 59 to "rescue" a plaintiff from simple negligence, or a "blunder" by his attorney, the facts of this case go far beyond a simple blunder by a plaintiff's attorney. The conduct of the Irvins' attorneys

---

16 Pet. App. 14a.

17 Pet. App. 26a, n24.

18 Pet. App. 20a.

in this case constitutes "neglect so gross that it is inexcusable."[19]

* * *

Second, the omitted evidence was critical to the Irvin's case because the evidence, had the court accepted it, arguably creates a dispute of material fact that would have allowed the Irvins to defeat summary judgment....[20]

Finally, the defendants would not be prejudiced by the admission of this evidence because the plaintiffs provided defendants with the relevant information in September of 2000, almost two years before defendants filed their summary judgment motion.

In short, proper application of the factors that this court has instructed district courts to use in deciding whether to consider additional evidence submitted with a Rule 59 motion should have led the district court to consider the evidence.[21]

2. The jurisdictional issue: Is there federal jurisdiction?

The Irvins did not raise in its notice of appeal any jurisdictional issue. At oral argument, the court of appeals *sua sponte* inquired whether any

---

19 Pet. App. 22a [internal notes omitted].

20 Pet. App. 25a.

21 Pet. App. 26a.

appellate level precedent in the fifth circuit supported subject matter jurisdiction in this case. More specifically, the court inquired whether the Convention Act supported jurisdiction.. After demanding full briefing, the Georgia Gulf Defendants filed a supplemental brief on this issue, as did the Irvins. Their directive notwithstanding, the court of appeals refused to reach the jurisdictional issue, stating: "In their notice of appeal, the Irvins do not raise any issue as to the propriety of the initial removal of this case from state court nor as to the propriety of the denial of their motion to remand to state court; and we accordingly have not addressed these issues on appeal."[22]

REASONS FOR GRANTING THE WRIT

This case presents a technical and recurring jurisdictional issue: whether the Convention Act confers federal removal jurisdiction in the following familiar circumstances:

- Plaintiffs, non-signatories to an arbitration agreement, bring a personal injury action against multiple tortfeasors;
- Plaintiffs include in their lawsuit direct action claims against a tortfeasor's foreign insurers;
- The tortfeasor has a written agreement with its insurers to submit disputes to arbitration;

---

22 Pet. App. 7a n.1.

- The tortfeasor and its insurers' arbitration agreements are subject to the Convention Act;
- The direct action against defendant's insurers seek federal removal on the strength of the Convention;
- Plaintiffs do not consent or otherwise acquiesce to arbitration; and
- All defendants do not consent to removal from state court to federal court.

This is a question of first impression in this Court, which raises important issues both about the efficient functioning of the district courts and about the proper relation between courts of the States and courts of the United States.

The second question presented involves the proper standard to be applied in determining whether a district court abuses its discretion in refusing to consider material presented in the context of a timely Rule 59(e) to amend, alter, or reconsider a judgment on the basis of manifest injustice where it is clear that trial deadlines were ignored while the litigants were without counsel. These deadline violations were compounded here by enrollment of new counsel. After the deadlines were long past, new counsel made no attempt to respond to a summary judgment motion—even though the Plaintiffs had produced evidence during discovery which may have, in the words of the

dissenting judge, "arguably create[d] a dispute of material fact ... to defeat summary judgment."[23]

The second question asks the Court to revisit the jurisprudential rule of *Link v. Wabash R. Co.*: in "our system of representative litigation . . . each party is deemed bound by the acts of his lawyer-agent,[24]" where, as is the case here, the litigants are blameless and the court has inadvertently contributed to the virtual abandonment of the litigants case at a critical times in the litigation.

I. THE CONDITIONS PRECEDENT FOR ARBITRATION ARE NOT PRESENT.

A. The Conditions Precedent for Arbitration: A Mutual Agreement to Arbitrate

It is a familiar principle that the right and duty to arbitrate disputes is purely a matter of contractual agreement between the parties.[25] Accordingly, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[26] The threshold inquiry is whether the parties have agreed to arbitrate.

---

23 Pet. App. 26a.

24 370 U.S. 626, 634, 8 L. Ed. 2d 734, 82 S. Ct. 1386 (1962).

25 *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15-18, 92 S. Ct. 1907, 1916-18, 32 L. Ed. 2d 513 (1972

26 *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960).

This Court has consistently held that unless there is "clear and unmistakable" evidence that the parties have consented to arbitration, the courts should not assume that the cause is arbitral.[27] This Court has further instructed, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[28]

Accordingly, "[i]n order to be subject to arbitral jurisdiction, a party must generally be a signatory to a contract containing an arbitration clause."[29] Arbitration agreements "must be in writing and signed by the parties" and may apply to nonsignatories only "in rare circumstances."[30] This Court has made clear that arbitration is a matter of private contract, and "it goes without saying that a contract cannot bind a nonparty."[31] The Irvins have no written agreement to arbitrate with any party to this litigation.

---

[27] *First Options v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 1244, 131 L. Ed. 2d 985 (1995).

[28] *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960).

[29] *Sapic v. Gov't of Turkm.*, 345 F.3d 347, 353 (5th Cir. 2003), *reh'g denied, reh'g, en banc, denied*, (5th Cir.2003)

[30] *Westmoreland v. Sadoux*, 299 F.3d 462, 465 (5th Cir. 2002).

[31] *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293-94, 151 L. Ed. 2d 755, 122 S. Ct. 754 (2002).

B. The Convention requires mutuality of contract.

The Convention Act does not alter the above analysis. The Convention Act requires that a court find the following for arbitration to hold: "(1) an agreement in writing to arbitrate the dispute (2) the agreement provides for arbitration in the territory of a Convention signatory, (3) the agreement arises out of a commercial legal relationship, and (4) a party to the agreement is not an American citizen."[32] The Convention itself makes mutuality of contract a condition precedent. The Convention requires that an "agreement in writing" to arbitrate must be signed by the parties or otherwise contained in an exchange of letters or telegrams.[33]

C. Exceptions to the Agreement in Writing Requirement

The courts have developed six theories, for binding a non–signatory to an arbitration agreement: (a) incorporation by reference; (b) assumption; (c) agency; (d) veil-piercing/alter ego; (e)

---

[32] *Sedco, Inc. v. Petroleos Mexicanos Mexican Na"l Oil Co.*, 767 F.2d 1140, 1144-45 (5th Cir. 1985).

[33] The Convention at Article II, 2. 31U.S.T. 2517. Lamm & Aqua, *Defining the Party—Who is a Proper Party in an International Arbitration Before the American Arbitration Association and Other International Institutions*, 34 Geo. Wash. Int'l L. Rev. 711, 720 (2003).

estoppel; and (f) third-party beneficiary.[34] None of these exceptions apply to the Irvins.

1. Incorporation by reference;

Incorporation by reference is a contract drafting technique where an extraneous writing becomes a part of a written contract by reference thereto.[35] This theory is not applicable here.

2. Assumption

"In the absence of a signature, a party may be bound by an arbitration clause if its subsequent conduct indicates that it is assuming the obligation to arbitrate."[36] Since the Irvins did not initiate

---

[34] *Sapic v. Gov't of Turkm.*, 345 F.3d 347, 353 (5th Cir. 2003); *See also Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 532 (5th Cir. 2000) (Dennis, J., dissenting). *Thomson-C.S.F., S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995); *Javitch v. First Union Securities, Inc.*, 315 F.3d 619, 629 (6th Cir. 2003). Holstein-Childress, *The Enforceability of Arbitral Clauses Contained in Marine Insurance Contracts Against Nonsignatory Direct Action Claimants*, 27 MAR. LAW. 205 (2002). Comment. *Arbitration, Consent and Contractual Theory: The Implications of EEOC v. Waffle House*, 8 Harv. Negot. L. Rev. 289 (2003); Annot., *Enforcement of Arbitration Agreement Contained in Construction Contract by or Against Nonsignatory*, 100 ALR5th 481 (2002); Lamm & Aqua, *Defining the Party—Who is a Proper Party in an International Arbitration Before the American Arbitration Association and Other International Institutions*, 34 Geo. Wash. Int'l L. Rev. 711 (2003).

[35] *See generally* Ballentine's Law Dictionary, 3rd Edition (1969); Farnsworth Contracts Sec. 4.26, n.19 (2001).

[36] *Thomson-C.S.F., S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 777 (2d Cir. 1995).

or advantage themselves of arbitration, this theory is not apposite.

3. Agency

"Traditional principles of agency law may bind a nonsignatory to an arbitration agreement."[37] There is no agency present here.

4. Veil-Piercing/Alter Ego

The Irvins have no connection with any corporation or other incorporeal being to apply this doctrine.

5. Estoppel

This non-signatory theory has been aptly condensed:[38]

> Courts may estop a non-signatory from refusing to comply with an arbitration clause "when it receives a 'direct benefit' from a contract containing an arbitration clause." Under this pure equity analysis, if a non-signatory receives notice of an arbitration clause contained in an agreement that intentionally and directly benefits her, and she fails to object to the agreement, she may be bound by its terms. This policy exists because "allowing [a plaintiff] to claim the benefit of the contract and si-

---

[37] *Id.*

[38] Lamm & Aqua, *Defining the Party—Who is a Proper Party in an International Arbitration Before the American Arbitration Association and Other International Institutions*, 34 Geo. Wash. Int'l L. Rev. 711, 727 (2003).

multaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act."

There is no estoppel to apply here.

6. Third-Party Beneficiary

Louisiana's direct action statute,[39] allowing a personal injury claimant to sue directly the tortfeasor's insurer, does not make the personal injury claimant a third–party beneficiary of the policy. It was observed in *Zimmerman v. Int'l Cos. & Consulting, Inc.*, "the FAA, the source of the federal policy favoring arbitration, has no application to require a direct action plaintiff to arbitrate or to stay their lawsuits during arbitration."[40] *Zimmerman* further held that direct action plaintiffs are not third-party beneficiaries of the insurance policy bound by the arbitration clause.[41] The analysis under the Convention Act is no different.

D. Removal requires consent of all defendants.

Section 205 of the Convention Act provides that "the defendant or the defendants" may remove the action to federal court. This phrase is identical to the language of the general removal statute, 28 U.S.C. 1441(a), which has been held to require

---

39 La. R.S. 22:655.

40 107 F.3d 344, 346 (5th Cir. 1997).

41 Id.; Grundmeyer, *Fifth Circuit Symposium 2000: Insurance*, 46 Loy. L. Rev. 31, 36 n.34 (2000).

that all defendants join in the removal.[42] Here, all defendants did not join in the removal. The district court nevertheless found

> [a]fter considering both the policies underlying the Convention and its removal statute and without restating all of the reasoning of **Acosta**, this court concluded that to require consent of all defendants would defeat the legislative purpose of §205 and the broad construction given to it under prior case law.... The consent of all non-removing defendants is not required under the statutes implementing the Convention.[43]

This holding acquiesced to by the court of appeals is in variance with other courts and expands without warrant the boundaries of the Convention Act. *See, e.g., Matter of Amoco Petroleum Additives Co.*, 964 F.2d 706 (7th Cir. 1992) (denying a writ of mandamus as to a district court order of remand based on the failure of all defendants to join in the removal under the Convention Act § 205).

Moreover, the *Acosta* reasoning employed in the case *sub judice* cannot be squared with the clear language of § 205, that "**[t]he procedure for removal of causes otherwise provided by law shall apply,**" which means that the general removal rule of section 1441(a) that all defendants must join in

---

42 MOORE'S FEDERAL PRACTICE ¶107.11.

43 Pet. App. 41a-42a.

the notice of removal also applies to removals under section 205.

The interpretation of the Act in the *Acosta* manner would permit removal to federal court for every third-party agreement containing an arbitration clause even if no defendant joined the removing defendant. A fender–bender involving several cars would be subject to federal jurisdiction at the whim of a foreign insurance company that insured one defendant driver or the foreign insurer's insured! Indeed, any automobile owner could defeat state court jurisdiction at his discretion by having a foreign insurer with an arbitration agreement. This result would have the unanticipated consequence of conferring a business advantage to an offshore insurer over a domestic insurer.

II. Manifest Injustice.

Under the terms of F.R.Civ.P. 59(e), a court may grant a motion to alter or amend a judgment in any of the following circumstances:

- to take account of an intervening change in controlling law;
- to take account of newly discovered evidence;
- to correct clear legal error; or
- to prevent manifest injustice.

The court of appeals in its decision accurately stated that "the Irvins requested that the district court reconsider and vacate the November 21, 2002, judgment to prevent **manifest injus-**

tice."[44] The court then conflates manifest injustice with manifest error of law and fact.[45] While there may not be a **manifest error of law or fact** present here, there is a **manifest injustice**.

> **A. The customary rule that one who voluntarily chooses his attorney cannot avoid the consequences of the acts or omissions of his freely selected agent should not apply where there are large gaps where the litigant during critical times in the litigation was without counsel—"a situation permitted by the district court—during the period of time that assistance of counsel was most crucial"[46]—and counsel was allowed to withdraw during this critical time without any procedural safeguards and without inquiring of an unrepresented litigant if it was his desire to proceed at any time without representation.**

The district court countenanced a revolving door of representation that left critical gaps in the Irvins' legal representation. The attorney withdrawal tolerated by the district court inadvertently, but surely, aided the "complete abandonment by the legal system"[47] here depriving the Irvins of a

---

44 Pet. App. 6a.

45 Pet. App. 12a-14a.

46 Pet. App. 23a.

47 Pet. App. 26a.

decision on the merits, thereby wreaking a manifest injustice upon a seriously injured litigant. The time-honored *Link v. Wabash R.R.*, aphorism that one who "voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer–agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney,"[48] should not apply where the litigant is blameless and the court is complicit in the problem.

On the facts of this case, the easy answer is also the one that results in manifest injustice. What is evident here is not a mere attorney blunder. It is as found by the dissent, "egregious lawyer misconduct" causing the Irvins a "deprivation of representation and the benefits of the adversary system of justice." While a litigant may bear responsibility in an ordinary case, in the circumstances here the court that set the pretrial scheduling and allowed a revolving door of representation without any input from the client also bears responsibility and incumbent upon the court to correct the manifest injustice. In these circumstances, it is an abuse of the trial court's discre-

---

[48] 370 U.S. 626, 634, 82 S. Ct. 1386, 8 L.Ed.2d 734 (1962) quoting *Smith v. Ayer*, 101 U.S. 320, 326, 25 L.Ed. 955 (1879).

tion not to view the evidence accompanying the Rule 59(e) motion and Rule 59(e) relief is indicated.

CONCLUSION

For the foregoing reasons, we respectfully request that a writ of *certiorari* be granted.

Respectfully submitted.

Robert S. Abdalian
Counsel of Record
Suite 235—S. Jefferson Davis Parkway
New Orleans, LA 70125
(504) 304-2308